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NO. 96-6839

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

Supreme Court, U.S.
FILED

NOV 20 1996

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HUGO ROMAN ALMENDAREZ-TORRES,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

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Respectfully submitted,

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17 PP

QUESTIONS PRESENTED

- I. DOES A SENTENCING COURT VIOLATE DUE PROCESS BY DETERMINING TITLE
8 U.S.C. § 1326(b)(2) IS NOT A SEPARATE OFFENSE FROM TITLE 8 U.S.C. § 1326,
BUT MERELY A SENTENCING ENHANCEMENT?

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NO. _____

**IN THE
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October Term, 1996

HUGO ROMAN ALMENDAREZ-TORRES,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals decided and filed August 22, 1996.

OPINION BELOW

The opinion of the Court of Appeals is unreported pursuant to Fifth Circuit Local Rule 47.5. The unpublished manuscript opinion is attached as Appendix A.

JURISDICTION

The opinion of the Court of Appeals (Appendix A) was filed on August 22, 1996. This Court's jurisdiction is invoked under Title 28, United States Code, § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provision at issue in Question 1 of this petition, 8 U.S.C. § 1326, is set forth in Appendix B to this petition.

STATEMENT OF THE CASE

The United States District Court, Northern District of Texas, Fort Worth Division, had jurisdiction pursuant to Title 18, United States Code, § 3231.

A. Proceedings Below

On September 12, 1995, the appellant, Hugo Roman Almendarez-Torres (hereinafter "Almendarez-Torres") was charged by indictment with illegal re-entry into the United States after deportation, in violation of Title 8, United States Code, Section 1326. On December 1, 1995, Almendarez-Torres pleaded guilty before the Honorable John McBryde, in the Northern District of Texas, Fort Worth Division. On March 1, 1996, Judge McBryde sentenced Almendarez-Torres to a term of imprisonment of 85 months, plus a term of two (2) years supervised release. Almendarez-Torres filed a timely Notice of Appeal, and an appeal followed.

Oral argument was not held in this case, and on August 22, 1996, the United States Court of Appeals for the Fifth Circuit rendered its decision affirming the judgment of the district court. United States v. Hugo Roman Almendarez-Torres, (No. 96-10254) (5th Cir., August 22, 1996) (unpublished) (copy of opinion attached as Appendix A).

Facts relating to Question I

HUGO ROMAN ALMENDAREZ-TORRES is a national of Mexico, having been born in Villa Hidalgo, San Luis Potosi, Mexico on August 9, 1971.

On March 11, 1991 the defendant was convicted in Criminal District Court Number Two of Tarrant County, Texas for the offense of Burglary of a Habitation in Cause Number 0432394D. On July 26, 1991 the defendant was convicted in Criminal District Court Number Two of Tarrant County, Texas for the offenses of Burglary of a Habitation in Cause Numbers 0444757A and 0437963A. On March 14, 1991 the defendant was convicted in a Criminal District Court of Dallas County, Texas for the offense of Burglary of a Habitation in Case Number F-91-29541-UH.

The defendant, on April 18, 1992 was deported from the United States to Mexico at Brownsville, Texas pursuant to his convictions.

REASONS FOR GRANTING THE WRIT
Overview

At issue in this case is whether two subsections of a statute, Title 8 U.S.C. § 1326(a) and § 1326(b) are dependent on one another, or whether each subsection is a separate offense with elements that must be proven beyond a reasonable doubt. At least two intermediate appellate courts have arrived at conflicting answers to this question.

The Fifth Circuit has held that defendants convicted under 8 U.S.C. § 1326(a) can be sentenced under § 1326(b)(2) upon mere proof to the sentencing court by a preponderance of the evidence, because subsection (b) is merely a sentencing enhancement of subsection (a). United States v. Vasquez-Olvera, 999 F.2d 943 (5th Cir. 1993), cert. denied, 510 U.S. 1076 (1994). Contrarily, the Ninth Circuit has held that prosecutors must prove all elements of subsection (b) beyond a reasonable doubt before a defendant is subject to the fifteen-year maximum sentence provided for by § 1326(b)(2). United States v. Campos-Martinez, 976 F.2d 589 (9th Cir. 1992).

Recently, the Supreme Court ordered the Solicitor General to brief this very issue in response to a petition for Certiorari in United States v. Najera-Ojeda, No. 96-6148.

Accordingly, this Court should grant certiorari to consider the following question:

- I. DOES A SENTENCING COURT VIOLATE DUE PROCESS BY DETERMINING TITLE 8 U.S.C. § 1326(b)(2) WAS NOT A SEPARATE OFFENSE FROM TITLE 8 U.S.C. § 1326, BUT MERELY A SENTENCING ENHANCEMENT?

Argument

- I. **DOES A SENTENCING COURT VIOLATE DUE PROCESS BY DETERMINING TITLE 8 U.S.C. § 1326(b)(2) IS NOT A SEPARATE OFFENSE FROM TITLE 8 U.S.C. § 1326(a), BUT MERELY A SENTENCING ENHANCEMENT?**

In United States v. Vasquez-Olvera, a divided Fifth Circuit panel determined that 8 U.S.C. § 1326(b) is a sentencing-enhancement factor for 8 U.S.C. § 1326(a). United States v. Vasquez-Olvera, 999 F.2d 943, 945 (5th Cir. 1993), cert. denied, 510 U.S. 1076 (1994). In so doing, the court relied on the criteria enunciated in United States v. Davis, 801 F.2d 754 (5th Cir. 1986). Under the Fifth Circuit's evaluation, 1326(b) meets the four elements of the Davis test, "(1) whether the statute predicates punishment upon conviction under another section, (2) whether the statute multiplies the penalty received under another section, (3) whether the statute provides guidelines for the sentencing hearing, and (4) whether the statute is titled as a sentencing provision." United States v. Vasquez-Olvera, 999 F.2d at 945, citing Davis, id. at 756.

The Fifth Circuit contends that 8 U.S.C. § 1326(b) meets criteria numbers 1, 2, and 4. Vasquez-Olvera, 999 F.2d at 945. Undaunted by the missing element, the Fifth Circuit concluded, "Subsection (b) meets three of the four Davis factors and has enough of the common traits of a sentence enhancement provision for us to conclude that Congress intended for it to be a sentence enhancement provision." Vasquez-Olvera, 999 F.2d at 945.

The Fifth Circuit relied heavily on the fact that Congress included the following words in the statute: "subject to subsection (b) of this section" and "notwithstanding subsection (a) of this section." The Fifth Circuit also stated, "It is highly unlikely that Congress would structure the statute in such a way that subsection (b) is dependant [sic] on elements of subsection (a), if it intended for subsection (b) to be a separate criminal offense." Vasquez-Olvera, 999 F.2d at 946.

In her dissent, Judge King expressed skepticism toward the majority's reasoning:

I believe that, while the majority's interpretation is a permissible one, there is another, equally permissible interpretation of the statute...In this regard, I observe that subsection (b) states that it appears "in the case of any alien described in" subsection (a). It does not say "in the case of any alien convicted of" the offense set forth in subsection (a). I further

believe that the use of the phrase "[n]otwithstanding subsection (a)," if anything, argues in favor of holding that the drafters of subsection (b) intended it to be a separate offense.

Id. at 948 (emphasis in original).

The Fourth Circuit, following Vasquez-Olvera, held, "[T]he plain language of § 1326 indicates that subsection (b) is a sentence enhancement provision rather than a separate offense." United States v. Crawford, 18 F.3d 1173, 1178 (4th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 171 (1994). The First Circuit has also held in accordance with the Fourth and Fifth Circuits. See United States v. Forbes, 16 F.3d 1294 (1st Cir. 1994); United States v. Smith, 36 F.3d 128 (1st Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 529 (1994). Contrarily, the Ninth Circuit has held, in a series of cases, that 8 U.S.C. § 1326(a) and 8 U.S.C. § 1326(b) are separate offenses. See United States v. Arias-Granados, 941 F.2d 996 (9th Cir. 1991); United States v. Campos-Martinez, 976 F.2d 589 (9th Cir. 1992); United States v. Gonzalez-Medina, 976 F.2d 570 (9th Cir. 1992).

Due process compels the Ninth Circuit's interpretation. This Court held in In Re Winship, 397 U.S. 358 (1970) that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Winship, *id.* at 364. Additionally, under McMillan v. Pennsylvania, 477 U.S. 79 (1986), a higher standard of proof is required where a statute either changes a maximum penalty or creates a new offense with its own penalty. McMillan, *id.* at 88.

Because § 1326(a) provides for a two-year statutory maximum sentence and § 1326(b) provides for a fifteen-year statutory maximum sentence, due process demands the prior conviction be proven beyond a reasonable doubt. See McMillan, *id.* Almendarez-Torres' prior conviction was not proved beyond a reasonable doubt. Accordingly, in the absence of proof beyond a reasonable doubt of the prior conviction necessary to constitute a violation of § 1326(b)(2), Almendarez-Torres may not be sentenced to more than the two-year maximum provided for in § 1326(a).

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this matter.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS

FILED

AUG 22 1996 ✓

CHARLES R. FULBRUGE III
CLERK

No. 96-10254
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HUGO ROMAN ALMENDAREZ-TORRES,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:95-CR-124-A

Before KING, DUHÉ, and DeMOSS, Circuit Judges.

PER CURIAM:*

Hugo Roman Almendarez-Torres appeals his judgment of conviction and sentence after pleading guilty to reentry after deportation in violation of 8 U.S.C. § 1326. He argues that he was charged with and pleaded guilty to § 1326(a), simple reentry, but that he was sentenced as if he had pleaded guilty to reentry following a conviction for an aggravated felony for purposes of § 1326(b)(2). His argument is foreclosed by this court's opinion

* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

APPENDIX A

RMH *OK* *HFD*

in United States v. Vasquez-Olvera, 999 F.2d 943 (5th Cir. 1993),
cert. denied, 510 U.S. 1076 (1994).

AFFIRMED.

APPENDIX B

§ 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens

(a) Subject to subsection (b) of this section, any alien who—

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless

(A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

(1) whose deportation was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 20 years, or both.

For the purposes of this subsection, the term "deportation" includes any agreement in which an alien stipulates to deportation during a criminal trial under either Federal or State law.

(As amended Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7345(a), 102 Stat. 4471; Nov. 29, 1990, Pub.L. 101-649, Title V, § 543(b)(3), 104 Stat. 5069; Sept. 13, 1994, Pub.L. 103-322, Title XIII, § 130001(b), 108 Stat. 2023.)